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No. 95-1782

In The
Supreme Court of the United States
October Term, 1995

LAURINA PRICE,

Petitioner,

vs.

S-B POWER TOOL, also known as
Skil Corporation, a division
of Emerson Electric Company,

Respondents.

Response to Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner challenges the findings of fact by the District Court and the Eighth Circuit Court of Appeals in which both Courts held that based on the undisputed evidence, an employee failed to establish a prima facie case of discrimination under the Americans With Disabilities Act, and that even if the employee made out a prima facie case, the employee failed to present any evidence that the employer's stated reason for discharge (excessive absenteeism) was a pretext for discrimination.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

S-B Power Tool is jointly owned by Emerson Co. and Robert Bosch Company. There are no non-wholly owned subsidiaries of S-B Power Tool.

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Respondent, S-B Power Tool prays that this Court deny the Petition for Writ for Certiorari to the United States Court of Appeals for the Eighth Circuit on the question presented.

I. STATEMENT OF STATUTE INVOLVED

The question for review involves the Americans With Disabilities Act, 42 U.S.C. Section 12101 et seq., which, inter alia, prohibits discrimination against qualified individuals with a disability who can perform the essential functions of a job, with or without a reasonable accommodation.

II. STATEMENT OF THE CASE

Petitioner was discharged from her job on an assembly line because of her excessive absenteeism. Regular and predictable attendance at work was an essential function of Petitioner's job which Petitioner was unable to perform, with or without a reasonable accommodation. The District Court and the Eighth Circuit Court of Appeals both held that Petitioner could not make a prima facie case of discrimination under these circumstances, and that even if a prima facie case of discrimination had been made out, Petitioner did not present any evidence of pretext sufficient to allow a jury to infer that the stated reason for discharge (excessive absenteeism) was a mere pretext for discrimination against Petitioner on the basis of her disability.

III. STATEMENT OF DISPUTED FACTS

At page 5 of Petitioner's Petition for Writ of Certiorari, under the heading of Statement of the Case, the

Petitioner makes the following statement: "Defendant had made accommodations for Price for the first six (6) years of Price's employment by occasionally giving Price either verbal or written warnings, but never terminating Price, even though her absentee rate rose over 3%." Respondent denies that Price was treated any differently regarding her absenteeism earlier in her career. Indeed, when Petitioner's attendance rate exceeded 3%, she was given verbal and written warnings that if her attendance did not improve, she would be discharged. When her attendance did in fact improve, she was not discharged. Later in her career, when her attendance again exceeded 3%, she was again given verbal and written warnings that if her attendance did not improve, she would be discharged. When her attendance did not improve, she was discharged. Petitioner then alleges that the difference in the two situations was "an apparent change in policy ... directed toward Price" as a result in a change in ownership. In fact, Respondent's policy directed toward Price was the same in both situations: If Petitioner's attendance did not improve, she would be discharged. The difference in the two situations was not in Respondent's behavior, but rather in Petitioner's behavior. In the first situation, Petitioner improved her attendance and she was not discharged. In the second

situation, Petitioner did not improve her attendance and she was discharged.

IV. REASONS FOR DENYING WRIT

Rule 10 of the Supreme Court Rules sets forth the criteria this Court normally uses in deciding whether to grant a Writ of Certiorari. Specifically, Rule 10 states that "A petition for a writ of certiorari is rarely granted when the error asserted consists of erroneous findings of fact ..."

Petitioner's alleged error herein is that the lower courts findings of fact with regard to the establishment of a prima facie case and with regard to pretext are in error. For this reason alone, this Court should deny Petitioner's Writ of Certiorari.

Even a cursory review of the facts in this case make it clear that this is not one of the rare cases on which the petition should be granted based on erroneous findings of fact.

After making extensive findings of fact based on the record before it, the District Court held:

> Since it is undisputed that plaintiff can perform her job on the line, the only issue is attendance By affidavits and the attendance policy, defendant has established that good attendance is an essential function of plaintiff's job. Plaintiff did not ask for any accommodation as to her absences related to her epilepsy and did not identify what reasonable

> accommodation could have been made by defendant given the nature of plaintiff's duties on the production line. Her termination followed an absence that was not related to her epilepsy. In addition, plaintiff's examples of Brandon and Collins do not demonstrate that they were treated differently than her. The uncontroverted evidence is that they were being progressively disciplined the same as plaintiff, but they quit before the next step of termination. Thus, plaintiff has failed to establish a prima facie case of discrimination under the ADA.
>
> Even if the Court were to assume that plaintiff had made a prima facie case, defendant has met its burden of production by providing evidence to sustain a judgment in its favor. Plaintiff has not established the existence o facts which would permit a jury to conclude that defendant's proffered reason was pretextual or that intentional discrimination was the true reason for defendant's actions.

In reviewing the District Court's decision, the Eighth Circuit Court of Appeals addressed Petitioner's claims that the District Court erred:

> Price did not meet her burden of establishing a prima facie case because the record does not show that Price's termination occurred under circumstances that would permit an inference of discrimination. Price has not presented any facts tending to suggest that she was terminated because of her disability. She asserts that she was treated differently from other similarly situated nondisabled employees, but her claim is not supported by her own evidence. She identifies two non-disabled employees with similar attendance

problems, but does not show that they were treated any differently. both had received oral and written warnings in response to their attendance rates rising above three percent. Neither was actually terminated, but that was because both quit voluntarily soon after receiving the written warning.

The evidence in the record, when viewed in a light most favorable to Price, shows only that she was terminated for being absent from work on April 12 and 13 without calling to arrange for leave time after being instructed specifically to do so. Her absences on those days were not related to her epilepsy, and she does not claim that her epilepsy prevented her from calling in to make arrangements for leave time. Her supervisor had warned her in March that she must call in to arrange for leave time if she was going to be absent for any reason. The record is insufficient to create a prima facie case of discrimination.

> Summary judgment would have been appropriate even if Price had established a prima facie case of discrimination because Skil offered a legitimate nondiscriminatory reason for her dismissal and Price failed to come forward with any evidence of pretext.

Even if Petitioner were not asserting that the lower courts findings of fact were erroneous, this Court should not grant the Petition for Writ of Certiorari because the court's that have addressed the issue of attendance as an essential function of a job have spoken in rare unity.

Reporting for work is perhaps the most fundamental requirement for almost every job, regardless of the type of work performed. As aptly stated by the court in Matzo v. Postmaster General, 685 F. Supp. 260, 263 (D.D.C. 1987), aff'd, 821 F.2d 1290 (D.C. Cir. 1988), "[a] minimal and basic qualification for any job . . . is the ability to report for work and remain on duty for the duration of the workday." The EEOC has likewise recognized the legitimacy of maintaining attendance control programs. "Leave policies . . . that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability." 29 C.F.R. § 1630.5. Even legitimate policies, such as attendance, which may have a disparate impact on persons with a disability are not subject to challenge. 29 C.F.R. § 1630.15(b) and (c).

Courts have uniformly recognized that an essential part of any job is the requirement of reasonably regular and predictable attendance; thus, an employee who cannot meet the attendance requirements of the job at issue cannot be considered a "qualified" individual protected by the ADA. See Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (summary judgment granted where employee "could not perform the 'essential function' of coming to work regularly); Tyndall v. National Education Centers, 31 F.3d at 213

(regardless of the fact that teacher performed well when she did come to work, frequent absences rendered her unable to function effectively; thus, summary judgment granted); Jackson v. VA, 22 F.3d 277, 279 (11th Cir. 1994), cert. denied, 115 S.Ct. 657 (1994) (summary judgment granted where janitor who was frequently absent from work failed to prove he was qualified and that he met the essential function of his employment, that of being present); Law v. United States Postal Serv., 852 F.2d 1278, 1279-80 (Fed. Cir. 1988) (agency is inherently entitled to require an employee to be present during scheduled work hours); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227 (S.D.N.Y. 1994) (motion to dismiss granted where court recognized employer may certainly require an employee's presence at the workplace when the presence is essential to the task to be performed); Walders v. Garrett, 765 F. Supp. 303, 310 (E.D. Va. 1991), aff'd, 956 F.2d 1163 (4th Cir. 1992) (summary judgment granted where court recognized that "some degree of regular, predictable attendance is fundamental to most jobs); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991) (an employee of any status, full or part time, cannot be qualified for his position if he is unable to attend the workplace to perform the required duties with any degree of predictability because

attendance is necessarily the fundamental prerequisite to job qualification); Lemere v. Burnley, 683 F. Supp. 275, 280 (D.D.C. 1988) (alcoholic employee was not qualified as result of pattern of unscheduled absences which "prevented her from following a regular work schedule under which she could 'perform the essential functions' of her position"); Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), aff'd, 831 F.2d 298 (6th Cir. 1987) (an employee "who does not come to work cannot perform any of his job functions, essential or otherwise"); Stevens v. Stubbs, 576 F. Supp. 1409, 1415 (N.D. Ga. 1983) (summary judgment granted because law does not protect absenteeism).

In the face of the numerous decisions supporting Respondent's argument that summary judgment was appropriate because Price could not perform the essential functions of her job as the result of her frequent and sporadic attendance, Petitioner merely cites EEOC v. AIC Security, 820 F. Supp. 1060 (N.D. Ill. 1993). However, AIC Security is distinguishable from the facts at hand. First, in AIC Security, the plaintiff's supervisor claimed that the plaintiff's disability did not affect the number of hours he worked. In contrast, it is uncontroverted that Petitioner's disability affected the number of hours she worked. Second, the plaintiff in AIC Security was never warned that his

attendance was unsatisfactory. Petitioner herein concedes that she was warned many times about her unsatisfactory attendance. Third, the plaintiff in AIC Security could perform many of the essential functions of his job at home. For instance, he could perform many of his duties by phone because whether he phoned from home or the office was not material. In this case, Petitioner could not perform any of the essential functions of her position, assembler on a factory assembly line, at home. Thus, unlike the situation in AIC Securities, the lower court's herein have properly ruled that attendance was an essential function of Petitioner's job, and as every court that has considered the matter, the lower court's properly held that Petitioner's attendance problems were not protected by the Americans With Disabilities Act.

V. CONCLUSION

The Courts below properly found that based on all the evidence viewed in the light most favorable to Petitioner, Petitioner failed to make out a prima facie case of discrimination, and failed to present evidence that Respondent's stated reason for discharge (excessive absenteeism) was a mere pretext to discriminate against Petitioner because of her disability. This case presents no

novel issues of law or fact, and this Court should deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

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